

ESTATE OF ALBIN (ALVIN) SHEMAMY

IBIA 85-8

Decided September 26, 1985

Appeal from an order denying petition to reopen entered by Administrative Law Judge Sam E. Taylor in IP OK 245 P 84, IP TU 233 P 77, and IP TU 16 P 77.

Affirmed.

1. Indian Probate: Reopening: Standing to Petition for Reopening

An adult who participated in the original probate hearing into a deceased Indian's estate normally lacks standing to petition for reopening.

2. Indian Probate: Reopening: Generally

Failure to raise arguments at a hearing or in a petition for rehearing does not confer any right to seek reopening to raise those arguments, in disregard of the regulatory proscription set forth in 43 CFR 4.242(h).

3. Administrative Procedure: Substantial Evidence--Indian Probate: Appeal: Generally

The Board of Indian Appeals will show deference to an Administrative Law Judge's determination of the credibility of evidence and testimony.

APPEARANCES: Amos E. Black III, Esq., Anadarko, Oklahoma, for appellants. Counsel to the Board: Kathryn A. Lynn.

OPINION BY ADMINISTRATIVE JUDGE MUSKRAT

On December 17, 1984, the Board of Indian Appeals (Board) received a notice of appeal from Edward Longhat, Clara Longhat, and the heirs-at-law of Alice Longhat (appellants). Appellants sought review of an October 17, 1984, order denying reopening issued by Administrative Law Judge Sam E. Taylor in the estate of Albin (Alvin) Shemamy (decendent). 1/ For the reasons discussed below, the Board affirms that order.

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1/ Throughout the record decendent's name is spelled "Shemamy" and "Shemayme." The Board will use the first spelling, which was used by the decendent in his will, and by the Administrative Law Judges.

### Background

Decedent, an unallotted Caddo Indian under the jurisdiction of the Anadarko Agency, Bureau of Indian Affairs (BIA), died testate on February 16, 1976. A hearing to probate decedent's Indian trust estate was held by Administrative Law Judge Jack M. Short on April 14, 1977. Judge Short issued an order and decree of distribution on July 22, 1977, in which he approved decedent's will, dated November 14, 1966, and found decedent's parents to be Bessie Shemamy and Tom (Thomas) Bird. Under that will, decedent devised all of his property to his half brother, Donald Bird. Because Donald Bird predeceased decedent, Judge Short applied the anti-lapse provisions of 43 CFR 4.261 in ordering distribution of decedent's Indian trust property to Donald Bird's daughter, Gayla Bird. 2/

Present appellants sought rehearing of Judge Short's order, contending inter alia that he had restricted their cross-examination of Tom Bird and that his findings were contrary to the evidence. Rehearing was denied by judge Taylor, who succeeded Judge Short. An appeal to the Board was taken from this denial. The primary issue on appeal was whether decedent was the son of Tom Bird. 3/ The Board found that Judge Short's decision had been based on the demeanor of the witnesses appearing before him, and further found no reason to overturn the finding of credibility. The Board also held that there was no evidence in the transcript that Judge Short had restricted the cross-examination of Tom Bird. Accordingly, Judge Taylor's denial of rehearing was affirmed. Estate of Albin (Alvin) Shemamy, 7 IBIA 70 (1978).

Appellants appealed the Departmental determination in Federal court. On December 31, 1979, the United States District Court for the Western District of Oklahoma affirmed the Board's decision, finding that it was supported by substantial evidence and that the administrative hearing was conducted fairly and impartially. Longhat v. Andrus, CIV-78-0929-D (W.D. Okla. Dec. 31, 1979). This decision was in turn affirmed by the Tenth Circuit Court of Appeals. Longhat v. Andrus, No. 80-1171 (10th Cir. Feb. 16, 1982).

The current appeal began when appellants filed a petition to reopen decedent's estate that Judge Taylor received on August 30, 1984. Appellants

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2/ Section 4.261 states:

"When an Indian testator devises or bequeaths trust property to any of his lineal descendants, mother or father, brothers or sisters, either of the whole or half-blood or their issue, and the devisee or legatee dies before the testator leaving lineal descendants, such descendants shall take the right, title, or interest so given by the will per stirpes. Relationship by adoption shall be equivalent to relationship by blood."

3/ If appellants succeeded in showing that decedent was not the son of Tom Bird, decedent and Donald Bird, the sole taker under decedent's will, would not be half-brothers. If decedent and Donald Bird were not half-brothers, the anti-lapse provisions of 43 CFR 4.261 would not apply, and decedent's estate would pass through intestacy. If decedent were intestate, appellants believe that they would receive a portion of his estate.

now contend that not all of the proceedings before Judge Short were made part of the record, stating that on numerous occasions the Judge went off the record and made decisions restricting their rights that do not appear in the transcript. Appellants further contend that during the 5-year period this case was under review within the Department and the Federal courts they were not aware the hearing record was incomplete because the counsel representing them at the hearing had no occasion to review the transcript until after the circuit court's decision.

On October 17, 1984, Judge Taylor denied reopening. He noted that the affidavit in support of reopening submitted by Christine Monroe, a.k.a. Katie Shemamy, offered only cumulative evidence. Furthermore, the statements made in the affidavit of Justus Hefley, the attorney who represented appellants at the hearing before Judge Short, were not supported by the record. Judge Taylor noted that, to the contrary, the transcript showed that Judge Short specifically informed Hefley that he did not want to foreclose him the opportunity to present his case and allowed him the chance to submit additional evidence after the conclusion of the hearing. No additional evidence was submitted.

Appellants appealed this order to the Board on December 17, 1984. An opening brief was received on February 19, 1985. No other briefs were filed.

### Discussion and Conclusions

[1] Initially, the Board finds that appellants lack standing to bring the present petition for reopening. <sup>4/</sup> Under Departmental regulations in 43 CFR 4.242(h), the only persons with standing to seek reopening are those who "had no actual notice of the original proceedings \* \* \* [and who were] not on the reservation or otherwise in the vicinity at any time while the public notices were posted." Tieyah, *supra*; Estate of Russell Harold Bobb, 5 IBIA 92 (1976). <sup>5/</sup> This rule was adopted in an effort to put an end to litigation concerning a deceased Indian's trust estate. The present case is an example of the reason for the rule. Appellants, who participated unsuccessfully in the original hearing, rehearing, appeal to the Board, appeal to a Federal district court, and appeal to a Federal circuit court, are now seeking a sixth opportunity to advance the same arguments. In the probably vain hope that this will be the last decision in this case, the Board will, however, address appellants' substantive arguments despite their lack of standing.

The primary issue raised by appellants in this appeal is the allegation that Judge Short manipulated the hearing transcript in order to prevent their introduction of relevant evidence and to conceal his manipulation. Appellants state:

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<sup>4/</sup> Although appellants called their petition one for rehearing or reopening, it must be treated as a petition for reopening because under 43 CFR 4.241, a petition for rehearing must be filed within 60 days from the original decision. See Estate of Julia Tieyah, 11 IBIA 211 (1983).

<sup>5/</sup> Cf. 43 CFR 4.242(a), which imposes a similar standing requirement when reopening is sought within 3 years of the probate decision.

The incomplete record was not known to appellants during the entire appeal process, and the appellants, through orderly and timely appeals exhausted their administrative remedies before the Secretary of the Interior and lodged an action for judicial review of the administrative action. \* \* \*

Appellant's Counsel, the writer of this brief, relied upon the Administrative record produced by the agency during the entire appeal process. \* \* \*

Much to the shock of the writer of this brief, it was discovered [after the circuit court's decision] that the recording device was directed to be switched off during a large portion of the trial of this case. Mr. Justus Hefley reviewed the testimony and the entire administrative record, and found large portions of his arguments, offers of proof, and certain portions of relevant testimony, which had actually been delivered during the course of the hearing, was [sic] missing during [sic] the administrative record.

Only after obtaining the sworn affidavit of Justus Hefley, Attorney At Law, did the writer of this brief file a Petition for Rehearing before the Honorable Sam E. Taylor, Administrative Law Judge. [6/]

Appellant's opening Brief at 3-5. Based upon these contentions, appellants argue that a hearing de novo must be held.

Throughout the appeal process both before the Department and the Federal courts, appellants argued that Judge Short was biased against them and denied them a fair and impartial trial. This allegation was consistently decided against appellants on the basis of the hearing transcript. Now appellants have taken their argument one step further by contending that the bias was not apparent in the transcript because it was shown only off the record. In making this claim, appellants contend that they were represented by Hefley before the Administrative Law Judge, but that he did not represent them on appeal and thus did not review the transcript until after the Tenth Circuit's decision.

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6/ The record contains an affidavit signed by Hefley on Aug. 28, 1984. The affidavit states:

"I, Justus Hefley, an attorney at law, of lawful age and being first duly sworn upon oath, depose and state:

"That I am a member of the Oklahoma Bar Association and have been admitted to the practice of law in the State of Oklahoma and that I was the Council [sic] of record for Edward Longhat Sr., Alice Shemamy and Clara Longhat and appeared with them at the trial of the Estate of Albin (Alvin) Shemamy, deceased Caddo unallottee.

"That I have reviewed the transcript of the trial proceedings held on the 14th day of April, 1977 at the Anadarko Indian Agency, Anadarko, Oklahoma and that I have discovered that said transcript is not an accurate record of the trial held on said date.

The Board takes official notice of its own records. On September 19, 1977, the Tulsa, Oklahoma, office of the Office of Hearings and Appeals received appellants' original petition for rehearing. This petition, which was filed 2 months after Judge Short's order, was signed by Hefley and raises no allegation that the hearing transcript was incomplete. Judge Taylor's November 25, 1977, order denying rehearing was explicitly based upon a review of the record, and was sent to appellants' attorneys, Hefley, James H. Ivy, and Amos E. Black III. On January 18, 1978, the Tulsa office received appellants' notice of appeal from the denial of rehearing. The notice was filed on behalf of appellants by their attorneys, Hefley, Ivy, and Black, and was signed by Black. The Board docketed the appeal on March 15, 1978, with separate distribution to Hefley, Ivy, and Black, as counsel for appellants. Appellants' brief in support of their appeal to the Board was signed by Hefley for himself, Ivy, and Black. The Board's decision on appeal was separately sent to Hefley, Ivy, and Black. There is no indication that Hefley ever withdrew as counsel for appellants before the Board. Rather, the only evidence in the official records of the Department of the Interior is that Hefley was co-counsel for appellants during the entire administrative appeal period.

The Board does not have copies of the distribution list used by the two Federal courts. Black was, however, listed as counsel for appellants. The Board has no reason to believe that Hefley represented appellants before the Federal courts.

[2] In view of the fact that the evidence available to the Board indicates that Hefley was representing appellants during the administrative review process, the Board cannot give credence to his statement that he had no opportunity to review the transcript prior to the circuit court's decision. Appellants had the opportunity to challenge the adequacy of the transcript during their appeal before this Board, and were on notice that reviewing officials would rely on the transcript in making their decisions. Appellants' failure to raise this argument at the proper time does not confer upon them any right to seek reopening in violation of the regulatory proscription of 43 CFR 4.242(h).

[3] Appellants' second argument is that Judge Taylor improperly refused to consider the affidavit furnished by Christine Monroe, a.k.a. Katie Shemamy, to the effect that Tom Bird did not have access to Bessie Shemamy

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fn. 6 (continued)

"That statements of the trial judge, Administrative Law Judge Short, made in open court have been deleted from the record as same relates to cross-examination and the very important issue of due process. To the best of my recollection, Administrative Law Judge Jack M. Short, made the statement that, "I have heard enough," and refused to allow counsel the right of calling additional material witnesses in support of their opposition to the purported last will and testament of Albin (Alvin) Shemamy.

"That I did not represent the above stated individuals in the appeal of this cause to the Board of Hearings and Appeals, U.S. District Court, 10th Court Circuit Appeals, Denver, Colorado and this is my first opportunity to review the trial transcript complained of herein.

during the time when decedent was conceived. 7/ The Board finds that Judge Taylor properly held that the evidence presented in the affidavit was cumulative. Taken literally, the evidence offered in the affidavit, like much testimony offered at the hearing, is that no man had access to Bessie during this period. This is an impossibility. What the affidavit and testimony show most clearly is that Bessie's friends did not know what she was doing at all times. Judge Short found, based upon witness demeanor and credibility, that Tom Bird was decedent's father. As noted by Judge Taylor, the Board, and both Federal courts, great deference is given to credibility determinations made by the trial judge. As the Board stated in its 1978 decision in this case, there is no basis for disturbing Judge Short's credibility determination.

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, Judge Taylor's October 17, 1984, order denying rehearing is affirmed.

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Jerry Muskrat  
Administrative Judge

We concur:

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Bernard V. Parrette  
Chief Administrative Judge

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Anne Poindexter Lewis  
Administrative Judge

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fn. 6 (continued)

"That one witness who was present and who would have been called to testify in behalf of the contestants was Christine Monroe a/k/a Katie Shemamy, who was in attendance in Chillocco Indian School at the time that the deceased, Albin (Alvin) Shemamy was conceived by his mother, Bessie Shemamy and other material witnesses were present to testify when Judge Short refused to receive any further testimony or evidence at said trial.

"Further affiant saith not."

7/ In her affidavit, Christine Monroe states that Bessie Shemamy was her cousin and that they attended Chillocco Indian School together from 1916 to 1919. Ms. Monroe further states that she "was present at the hearing of April 14, 1977 and wanted to testify, but Judge Short refused to allow me to testify even after me and my family requested that I be allowed to testify." The Board notes that a Christine Murrow was present at the Apr. 14, 1977, hearing and testified that she and Bessie Shemamy attended Chillocco Indian School together from 1916 until 1919. Ms. Murrow testified that Tom Bird did not have access to Bessie Shemamy at any time during the period when decedent was conceived. This testimony comprises four pages of the transcript. The Board further notes that appellants' original petition for rehearing was accompanied by an affidavit from a "Christine Shemayme Murrow," alleging the same facts.